LIBRARY
SUPREME COURT, U. S.

FILED
MAR 24 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.
No. 1193

WILLIAM THOMAS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals,
For the Sixth Circuit.

JAMES R. WILLIS, ESQ.,
205 Cleveland Transit Bldg.,
1404 East Ninth Street,
Cleveland, Ohio 44114,
Attorney for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

TABLE OF CONTENTS.

Opinions in the Courts Below ---------- 1

Jurisdiction ---------- 2

Statement of Questions Involved ---------- 2

Constitutional and Statutory Provisions Which the Case Involves ---------- 3

Statement of Facts ---------- 4

Argument ---------- 6

1. Where an accused, indicted for an alleged criminal offense, moves for the suppression and for the return of illegally acquired evidence, can the government by the simple expedient of dismissing its indictment deprive him of his right to a meaningful and definitive resolution of the constitutional issues raised in such motion? ---------- 6

2. Where to the Government's knowledge it has been stipulated in a state prosecution, growing out of a search by federal agents incident to the execution of a federal arrest warrant, that the State court's judgment would be subject to the federal Court's determination as to the validity of such warrant, can the government over defense objections dismiss its indictment and by such action successfully deny the accused his only meaningful opportunity to suppress as evidence, and to reacquire, property he contends was seized incident to an illegal search? ---------- 10

3. Can a valid arrest warrant be issued solely on the basis of conclusory allegations showing the affiant's belief that the accused had illegally sent narcotics through the mails was based on

information furnished him by "reliable informants," and by various narcotic agents in another city, which allegations were only supported by the insubstantial statement that the affiant "believed" certain named police officers and agents were material witnesses to the charge? ---------- 12

Conclusion ---------- 14

APPENDIX.

Relevant Docket Entries ---------- 1a

Complaint for Violation of U. S. C. Title 26, Section 4744(a) (April 21, 1966) ---------- 2a

Warrant of Arrest (April 21, 1966) ---------- 3a

Indictment (Nov. 16, 1966) ---------- 3a

Motion to Suppress and for Return of Illegally Acquired Property (Feb. 12, 1968) ---------- 4a

Brief in Support of Motion ---------- 7a

Motion to Advance for an Immediate Trial (Feb. 12, 1968) ---------- 9a

Order for Dismissal (April 3, 1968) ---------- 9a

Motion to Vacate Order of Dismissal (April 8, 1968) 10a

Order Overruling Motion to Dismiss (July 2, 1968) 11a

Order of the United States Court of Appeals for the Sixth Circuit Dismissing Appeal (Feb. 18, 1969) 12a

TABLE OF AUTHORITIES.

Cases.

Aguilar v. Texas, 378 U. S. 108 ..... 11, 13

Battle v. United States, 345 F.2d 438 (D.C. Cir., 1965) 7

Carroll v. United States, 354 U. S. 394 9

DiBella v. United States, 369 U. S. 121 8

Elkins v. United States, 364 U. S. 206 7

Giordenello v. United States, 357 U. S. 480 ..... 11, 13

Hair v. United States, 289 F.2d 894 12

Jones v. United States, 362 U. S. 257 14

McDonald v. United States, 335 U. S. 451 12

One Plymouth Sedan v. Pennsylvania, 380 U. S. 693 7

Parrish v. United States, 376 F.2d 601 9

Schoeneman v. United States, 317 F.2d 173 12

United States v. Follette, 267 F. Supp. 342 (S. D. N. Y., 1967) 14

United States v. Rosenwasser, 145 F.2d 1015 (9th Cir., 1944) 9

United States ex rel. Rogers v. Warden, 381 F.2d 209 (2d Cir., 1967) 14

Constitution and Statutes.

Constitution of the United States, Fourth Amendment 3

8 U.S.C., § 1254 2

26 U.S.C. § 4742 ..... 3, 4

26 U.S.C. § 4744 3

Federal Rules of Criminal Procedure.

Rule 5(a) ---------- 10
Rule 41(c) ---------- 10
Rule 41(e) ----------6, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. ----------.

WILLIAM THOMAS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals,
For the Sixth Circuit.

The Petitioner, William Thomas, asks that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, for the Sixth Circuit, made and entered herein on February 18, 1969 (12a), dismissing his appeal. The consequence of the dismissal of this appeal was the affirmance of the judgment of the District Court, which judgment dismissed without a hearing, over objections, Petitioner's *Motion to Suppress and for the Return of Illegally Acquired Property* (4a) that was pending disposition.

OPINIONS IN THE COURTS BELOW.

The District Court, for the Northern District of Ohio, entered its order of dismissal on April 3, 1968 (9a). No formal opinion was filed at that time, or when the Court's order, upon denying Petitioner's Motion to Vacate, was made.

In the Court of Appeals, its order likewise was not supported by any formal opinion.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 8, U.S.C., § 1254, which pertinently provides that:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> 1. By Writ of Certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF QUESTIONS INVOLVED.

1. Where an accused, indicted for an alleged criminal offense, moves for the suppression and for the return of illegally acquired evidence, can the government by the simple expedient of dismissing its indictment deprive him of his right to a meaningful and definitive resolution of the constitutional issues raised in such motion?

2. Where, to the government's knowledge, it has been stipulated in a state prosecution, growing out of a search by federal agents incident to the execution of a federal arrest warrant, that the state court's judgment would be subject to the federal court's determination as to the validity of such warrant, can the government over defense objections dismiss its indictment and by such action successfully deny the accused his only meaningful opportunity to suppress as evidence, and to reacquire, property he contends was seized incident to an illegal search?

3. Can a valid arrest warrant be issued solely on the basis of conclusory allegations showing the affiant's belief that the accused had illegally sent narcotics through the mails was based on information furnished him by "reliable informants" and by various narcotic agents in another city, which allegations were only supported by the insubstantial statement that the affiant "believed" certain named police officers and agents were material witnesses to the charge?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 26, U. S. C. A., § 4744 provides:

> "(a) *Persons in general.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

Title 26, U. S. C. A., § 4742 provides:

> "(a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

STATEMENT OF FACTS.

William Thomas, the Petitioner herein, was indicted along with a Lenore Jackson, in a three count indictment. This indictment charged him in count I with the unlawful possession, on April 21, 1966, of a quantity of marijuana (26 U.S.C. § 4742[a]), and in count II, with the unlawful transfer of marijuana, by mail, from Cleveland, Ohio, to Chicago (26 U.S.C. § 4742[a]). Count III charged Lenore Jackson, the co-defendant, with possession of this same quantity of narcotics on April 21, 1966.

The Record shows that, based on certain conclusory allegations in a formal complaint filed with the commissioner (2a), an arrest warrant charging Thomas "with acquiring marijuana without having paid the transfer tax required by the Internal Revenue Code of 1954" was issued. It was on the basis of this warrant that Thomas was arrested.

The complaint, the Record shows, was based on the following insubstantial allegations:

> "* * * this complaint is based on information furnished the undersigned, Agent James Hilbert, U. S. Bureau of Narcotics, by the Cleveland Police Department Narcotics Squad Detectives, reliable informants of the Federal Bureau of Narcotics, and agents of the U. S. Bureau of Narcotics, Chicago, Illinois.
>
> And the complaint further states that he believes agents Irvin Swank and Jack L. Lloyd, U.S. Bureau of Narcotics, Cleveland Police Department, Narcotics Squad Detectives James Veres, Walker Parhomovich and Lawrence Masek are material witnesses to this charge" (2a).

Because of the patent insufficiency of these allegations, Petitioner moved for the suppression and return of the physical evidence seized incident to the execution of the arrest warrant (4a). In his motion it was alleged,

inter alia, the arrest was made on the basis of the warrant and that the complaint was constitutionally deficient in that it failed to set forth the requisite probable cause. Further, Petitioner contended he had been illegally stopped wthout probable cause by the Cleveland Police, whose purpose was to search and inspect him as well as the contents of his car; and that having done so, these officers learned, and determined, he had in his possession a package addressed to an addressee in Chicago. It was alleged that this package was "opened and inspected" contrary to regulations before the same was delivered to its destination.

Next, the contention was made that in executing this warrant the agents, and the police who were assisting them, illegally conducted a search of the residence outside of which he was arrested, and seized therefrom certain contraband. The prayer was that the arrest warrant should be quashed and that the property seized, incident to its execution, suppressed or otherwise restored to him.

Petitioner also moved the District Court, on February 12, 1968, for an immediate trial of his case. This motion (9a) prompted the government, without notice to Petitioner, to request leave of Court to dismiss the indictment. The Court's entry of dismissal was made by the Court on April 3, 1968 (9a).

In response to this action, by the Court, Petitioner then moved the Court to vacate the order of dismissal (10a). In so doing, it was alleged, in substance, that incident to the execution of the invalid warrant, in this case, certain property was seized by the agents; which property was given to the State authorities, and had resulted in a State court prosecution against Thomas for the possession thereof. Also, the motion alleged that in the State court prosecution, in which a jury was waived,

the decision as to the validity of the warrant was, *by stipulation,* reserved for the District Court to make. This was done, it was stated, because the validity of the warrant not only entailed a consideration of the federal complaint and the warrant as written, the ultimate validity of the warrant entailed a consideration of facts showing, what was contended to be, an illegal search and seizure of contraband that had been sent to Chicago through the mails. Another allegation in the motion was to the effect that the government ought not, by the simple device of dismissing its case, be able to perpetrate a State conviction based on the possession of property seized incident to the execution of an illegal federal warrant. Nor, it was alleged, should the government be allowed to effect a silver platter type conviction by denying an accused the right to show his arrest was illegal.

Hence, it is from the Court's denial (11a) of Petitioner's motion, seeking to have the Court vacate the order of dismissal, that the appeal was taken to the Court of Appeals.

ARGUMENT.

1. Where an accused, indicted for an alleged criminal offense, moves for the suppression and for the return of illegally acquired evidence, can the government by the simple expedient of dismissing its indictment deprive him of his right to a meaningful and definitive resolution of the constitutional issues raised in such motion?

To be sure, it cannot be seriously doubted that a forum at some point along the way to allow accused persons an opportunity to fully explore the circumstances of their arrest is required. Doubtless it was for this reason Rule 41(e) of the *Rules of Criminal Procedure,* provides for and requires such a hearing prior to trial. That a fail-

ure to grant such a hearing can be a ground for reversal, even of a conviction, there likewise can be no doubt. See *Battle v. United States,* 345 F.2d 438 (D.C. Cir., 1965).

Yet, despite this, the problem here is broader. For while the government would be powerless to deny the requested hearing, if it intended to maintain its prosecution, the question still must be whether by dismissing the prosecution, can they eliminate any necessity for a hearing?

Granted the answer to this question would have to be a short one if no more were involved than the particular prosecution being dismissed. The same would be true if the only property that could be returned was contraband, the possession of which is prohibited by law.

But such is not the case here. The effect of a ruling on the motion would have collateral significances of literally gigantic proportions. *First,* there is the car that was seized, the return of which was being sought by motion. And, if it was shown that the government's seizure thereof was based on illegally acquired evidence, then it can only follow that its return would be required. *One Plymouth Sedan v. Pennsylvania,* 380 U. S. 693.

Second, there is the aspect of the motion which sought the suppression as evidence in any criminal proceeding all property seized incident to the execution of the government's defective, Aguilar-type, warrant. In this regard, not only was the Court's ruling required insofar as any possible tax liability for his alleged possession thereof; a consideration, a definite ruling as to the propriety of the warrant was required here because in a related State prosecution (based on this property seized, which property had been given to the State on "a silver platter" (*Elkins v. United States,* 364 U. S. 206)), it was stipulated that the State Court's judgment would be subject to the Federal Court's ruling as to the validity of the warrant.

In this regard, it can be further noted that in the State Court prosecution, petitioner was adjudged guilty of the crime of possession of narcotics, found in his possession when he was arrested, on the basis of the federal warrant in this case. Also, it is a fact that in the State Court prosecution, the trial judge did not pass on either the validity of the warrant or the sufficiency of the supporting affidavit. Yet, it was conceded and stipulated that that conviction necessarily would be subject to a ruling as to the validity of the warrant, which ruling it was anticipated would be made in this case that was pending at the time.

II.

Since the District Court did not set forth the basis for its ruling, we are left with the inescapable conclusion that the Court dismissed this case because that's the way the government wanted it. And since the government motives in seeking the dismissal could not be clearer, on this basis alone, there must be a Court somewhere to whom the complaint that the government's ulterior motives were to avoid having their warrant declared defective, and to avoid a ruling suppressing the fruits of their search.

In the government's argument against this appeal it will probably be contended that the entry of dismissal not only eliminated the case but the same mooted all pending motions. Our response to this is that the remedy provided for in Rule 41(e) must be regarded as an independent action, where it seeks relief broader than the mere suppression of evidence in a pending criminal prosecution. See *DiBella v. United States,* 369 U. S. 121.

Thus, in this case, the position is taken that, conceding the Court could dismiss the indictment, the effect of such dismissal could in no way eliminate the petitioner's right to seek, by motion, the suppression and return of il-

legally acquired property. Further, that having dismissed the indictment, the Court was required to regard the motion as an independent suit in equity.

In support of this thesis, the Court's attention is directed to the following analysis. *First,* the decision in *Carroll v. United States,* 354 U. S. 394, at 405, voices the idea that the essential character and the circumstances under which a motion to suppress is made determines whether it is an independent proceeding, or merely a step in the criminal case. If it can be regarded as an independent proceeding then its denial would be appealable. See *DiBella v. United States, supra.*

Next, there is authority for the position that "where no criminal action against him is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the Court's order therein is appealable as a final decision." *United States v. Rosenwasser,* 145 F. 2d 1015 (9th Cir., 1944).

From these cases, it must be clear than an action seeking suppression and return of illegally acquired property can be maintained independent of a criminal action. Hence, in this case where there was a criminal action when the motion was filed, the elimination of the case should not suffice to eliminate the motion. This is particularly so since it is clear that, unlike the situation in *Parrish v. United States,* 376 F. 2d 601, the government does not intend to present any further prosecutions against petitioner in which these issues can be raised. In *Parrish,* of course, the Court held that considering the fact that the issues raised by the motion could be considered as a part of a pending criminal case, the District Court could properly refuse to regard an action for the return granted both in equity and on the basis of Rule 41(e) as an independent

action. The opposite of this, of course, must be that where there is no such criminal action, it must be regarded as an independent action on its own merit.

Based on the above syllogism, it is our view that the District Court was required to consider the merits of petitioner's motion, and that it is unthinkable that the government can arrest an accused, seize his property, turn some of this property over to the State (thus allowing them to institute a separate state prosecution), purposefully delay his arraignment in violation of Rule 5(a), insist on a high bond at his arraignment, and when he ultimately files a motion challenging the lawfulness of his arrest and asks for the return of his property, the government can dismiss its case and that is the end of it.

2. Where to the Government's knowledge it has been stipulated in a state prosecution, growing out of a search by federal agents incident to the execution of a federal arrest warrant, that the State court's judgment would be subject to the federal Court's determination as to the validity of such warrant, can the government over defense objections dismiss its indictment and by such action successfully deny the accused his only meaningful opportunity to suppress as evidence, and to reacquire, property he contends was seized incident to an illegal search?

As the above statement of facts shows, Petitioner was arrested on the basis of a warrant (3a) issued by the U. S. Commissioner. The warrant, in turn, was based on Agent Hilbert's formal complaint (2a). This complaint, of course, charged Thomas with a specific federal offense.

It was contended in this case, by motion, that the warrant was issued without the requisite probable cause having been satisfactorily demonstrated. (See 41[c], Federal Rules of Criminal Procedure.) Also, it is here contended,

as was contended below, that even a cursory reading of these papers shows that the infirmities the U. S. Supreme Court found present in the affidavits of *Aguilar v. Texas,* 378 U. S. 108 and *Giordenello v. United States,* 357 U .S. 480.

In this case, as documented above, when the federal arrest was made, Petitioner was found to be in possession of an additional supply of narcotics—*i.e.*, marijuana. However, for reasons that have not been stated, he was prosecuted in the State Court for the possession of this contraband. The primary witnesses were federal officers. The chemist who defined this substance, testified he was employed by the government and that the narcotics had been in government custody.

From these circumstances, it is apparent there was complete cooperation between the state and federal prosecutors in this case. Thus if it was not known, by the government, by virtue of such joint participation, that the issue as to the validity of the warrant was not considered in the State prosecution, the government was specifically informed in Petitioner's motion by which he sought to have vacated the Court's order dismissing the indictment and the Motion to Suppress (10a).

Of course, as Thomas' motion shows, the reason the validity of the warrant was not being tested in the State Court was because its full and proper evaluation entailed a consideration not merely of the warrant per se, but a consideration of the action of agents of other branches of the government in both Ohio and Illinois. Also, there was the presence of Lenore Jackson, as a co-defendant in this case. A circumstance of no small importance in this case. For if the search of the home in Chicago, where the narcotics in this indictment were found, was illegal, then its suppression necessarily would have benefited the

Petitioner. See *McDonald v. United States*, 335 U. S. 451; *Hair v. United States*, 289 F. 2d 894; and *Schoeneman v. United States*, 317 F. 2d 173.

Again, it is our view that one victimized by an illegal search and seizure must have a right at some time to a determination as to whether his rights have been violated. We contend that this right entitled him to such a hearing in the District Court. Moreover, it is our view that his entitlement to this hearing is strengthened by the fact that it was stipulated that a State Court conviction, based on the seizure made incident to the federal arrest, would be subject to the federal court's decision as to the validity of the warrant. A circumstance of even greater significance here since the federal agents who arrested the accused testified in the State case.

If this is the law, then clearly it cannot be that the government can, by unilateral action, deprive this Petitioner of such right, nor can the District Court's action in submitting their will be said to be the end of it.

3. Can a valid arrest warrant be issued solely on the basis of conclusory allegations showing the affiant's belief that the accused had illegally sent narcotics through the mails was based on information furnished him by "reliable informants," and by various narcotic agents in another city, which allegations were only supported by the insubstantial statement that the affiant "believed" certain named police officers and agents were material witnesses to the charge?

If anything in the area of searches and seizures is beyond dispute it is the fact that while a search warrant may be based on hearsay, even from informants whose identity need not be disclosed, the affidavit supporting the

issuance of such warrant must show the underlying circumstances establishing the belief that a particular offense has been committed and the underlying circumstances from which the affiant concluded that his informant was reliable or his information credible. *Aguilar v. Texas,* 378 U. S. 108. Also see *Giordenello v. United States,* 357 U. S. 480, relied on in *Aguilar,* where the Supreme Court voided an arrest warrant which failed to set forth a sufficient factual pattern to support the issuance of an arrest warrant.

Thus, the apparent rationale that must be shown before it may be concluded an alleged informant is "reliable," is the fact that the mere statement by an officer that his informant is reliable is but a naked conclusion; hence, as such, is not sufficient to justify the issuance of a warrant. What is required is further information informing the magistrate of "some of the underlying circumstances" from which the alleged informant drew his conclusions, and "some of the underlying circumstances" from which the officer concluded that his informant was "credible" or his information "reliable." *Aguilar v. Texas,* 378 U. S., at 114-115.

Absent such further information in this case, it is clear that the issuance of the warrant in this case rather being drawn by the commissioner, "the inferences drawn from the facts which lead to the complaint" were drawn not by a neutral and detached magistrate, but by officers "engaged in the often competitive enterprise of ferreting out crime." *Giordenello v. United States,* 357 U. S., at 486.

In further assailing the issuance of this warrant, the following contentions, provable by a cursory look at the complaint and warrant, are made:

> *First,* the complaint fails to set forth any of the underlying circumstances from which the commis-

sioner could determine that the alleged informant either existed, or if he existed, that he was reliable. See *United States v. Follette*, 267 F. Supp. 342 (S. D. N. Y., 1967).

Second, the complaint fails to set forth the undisclosed information the informant supposedly supplied, and for that matter the complaint even failed to set forth the source of any information the informant may have had.

Third, the complaint fails to indicate the recency of the informant's information.

In summary then, there is no indication, nor can there be, other than that the arrest warrant in this case was issued merely because the commissioner was convinced the agent believed probable cause existed. But this is adverse to the requirement that it is the magistrate who must be convinced by the facts and underlying circumstances that there is probable cause (*United States ex rel. Rogers v. Warden*, 381 F. 2d 209 [2d Cir., 1967]). For it cannot be denied when the magistrate abdicates his duty in this regard, when he fails to "make his independent judgment on all the known facts, then he tends to become merely the tool of police interest." *Jones v. United States*, 362 U. S. 257, 273 (concurring opinion).

CONCLUSION.

For each of the above reasons, expressed herein on behalf of Petitioner, it is hereby urged that this Court should grant Certiorari, and upon review should reverse the judgment below.

Respectfully submitted,

JAMES R. WILLIS,
Attorney for Petitioner.

No. Cr. 66-360.

In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM THOMAS
and
LENORE JACKSON,

Defendants.

RELEVANT DOCKET ENTRIES.

11-16-66. Indictment filed.

2-12-68. Motion of Defendant Thomas to advance for immediate trial filed.

2-12-68. Motion of Defendant Thomas to suppress and for return of illegally seized evidence, with Memorandum in Support filed.

4-3-68. Order Dismissing Indictment Against Defendants Thomas and Jackson filed.

4-8-68. Motion of Defendant to vacate order of dismissal filed.

6-2-68. Endorsed ruling overruling Motion of Defendant Thomas to vacate Order of Dismissal filed.

7-2-68. Order overruling Motion of Defendant Thomas to vacate order of dismissal filed.

2-18-19. Order of the Court of Appeals dismissing appeal.

COMPLAINT FOR VIOLATION OF U. S. C. TITLE 26, SECTION 4744(a).

(Dated April 21, 1966.)

Before Clifford E. Bruce, Federal Building, Cleveland, Ohio.

The undersigned complainant being duly sworn states:

That on or about April 20, 1966, at Cleveland, Ohio in the Northern District of Ohio, Eastern Division, William Thomas did unlawfully acquire marihuana without having paid the transfer tax as required by the Internal Revenue Code of 1954 in violation of Section 4744(a), Title 26, U.S.C.;

And the complainant states that this complaint is based on information furnished the undersigned, Agent James S. Hilbert, U. S. Bureau of Narcotics, by Cleveland Police Department Narcotic Squad Detectives, reliable informants of the Federal Bureau of Narcotics, and agents of the U. S. Bureau of Narcotics, Chicago, Illinois.

And the complainant further states that he believes that Agents Irvin C. Swank and Jack L. Lloyd, U. S. Bureau of Narcotics; Cleveland Police Department, Narcotic Squad Detectives James Veres, Walter Parhamovich and Lawrence J. Masek are material witnesses in relation to this charge.

JAMES S. HILBERT,
Agent, U. S. Bureau of Narcotics.

Sworn to before me, and subscribed in my presence, April 21, 1966.

CLIFFORD E. BRUCE,
United States Commissioner.

WARRANT OF ARREST.

(Dated April 21, 1966.)

To Irvin C. Swank or Any Officer of the Federal Bureau of Narcotics:

You are hereby commanded to arrest William Thomas, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with acquiring marihuana without having paid the transfer tax required by the Internal Revenue Code of 1954 in violation of U.S.C. Title 26, Section 4744(a).

CLIFFORD E. BRUCE,
United States Commissioner.

INDICTMENT.

(Filed November 16, 1966.)

The Grand Jury charges:

On April 21, 1966, in the Eastern Division of the Northern District of Ohio, to wit, Cleveland, Ohio, William Thomas did unlawfully have in his possession a quantity of marihuana, and failed to produce for Agents of the Federal Bureau of Narcotics an official written order form, in Cleveland, Ohio; in violation of Title 26, Section 4744(a), U.S.C.

COUNT II.

And the Grand Jury further charges:

On April 20, 1966, in the Eastern Division of the Northern District of Ohio, to wit, Cleveland, Ohio, William Thomas did unlawfully transfer a quantity of marihuana to Lenore Jackson of Chicago, Illinois, not pursuant to an official order form, by mail, from Cleveland, Ohio, to Chicago, Illinois; in violation of Title 26, Section 4742(a), U.S.C.

COUNT III.

And the Grand Jury further charges:

On April 21, 1966, in the Eastern Division of the Northern District of Ohio, to wit, Cleveland, Ohio, Lenore Jackson did unlawfully have in her possession a quantity of marihuana, and failed to produce for Agents of the Federal Bureau of Narcotics an official written order form, in Cleveland, Ohio; in violation of Title 26, Section 4744(a), U.S.C.

MOTION TO SUPPRESS AND FOR RETURN OF ILLEGALLY ACQUIRED PROPERTY.

(Filed February 12, 1968.)

Comes now the Defendant, William Thomas, by and through counsel, and respectfully moves this Court pursuant to Rule 41(e) *Federal Rules of Criminal Procedure,* to suppress and to return to the Defendant certain property—seized by agents of the Federal Narcotics Bureau and others in privity with them (including various members of the Cleveland Police and agents of the United States Post Office, whose true names are unknown)—which property it is contended herein was seized either as evidence, or as property forfeited to the government. In support thereof, the Defendant avers as follows:

I.

(a) That on or about April 21, 1966, he was arrested by agents of the Bureau of Narcotics ostensibly on the basis of an arrest warrant (See Appendix A) charging him with an alleged violation of the Federal Narcotic Control Act.

(b) That this warrant not only was defective because it was based on a complaint that merely set forth conclusory allegation, insufficient to establish the requisite probable cause. The same was based

in part on evidence that had been illegally acquired in the following manner—that is, on April 21, 1966, officers of the Cleveland Police Department, illegally and without probable cause, stopped, arrested and detained the defendant who was then a motorist proceeding lawfully along a public roadway. That the purpose behind their doing this was to allow these officers to illegally search and inspect the defendant as well as the contents of his car—which was done.

(c) That incident to the above described illegal activity, these officers learned and determined the addressee on a package the defendant had in his car, which package was subsequently mailed to Chicago.

(d) That either in Chicago, or in Cleveland, it is alleged, upon information and belief, that, in violation of Part 113 of the Postal Manual (1961), this package was opened and inspected, before being forwarded to the indicated address, where the same was seized in violation of the prohibition against illegal searches and seizures.

II.

Defendant further says that in executing the arrest warrant, these officers, in violation of rights guaranteed him under the Fourth and Fifth Amendments of the constitution, grossly exceeded the bounds of reasonableness in conducting any incidental search that may have otherwise been authorized. In this regard, it is averred:

(a) That for purposes of facilitating their desire to conduct a general and exploratory search of premises described as 1621 East 91st, where the arrest was made, these officers purposefully delayed making any effort to execute their "warrant" until they knew, as a fact, the Defendant was inside.

(b) That although the Defendant was told by the agents that he was under arrest (for having sent narcotics through the mail at a previous time) which

could only authorize an incidental search for weapons, the entire premises were searched and certain property seized as evidence.

(c) That subsequent to this search, the Defendant's car was seized, based on information illegally acquired in the fashion delineated above, which seizure violated rights guaranteed him by the constitution.

(d) That following the disclosure of the presence in this apartment of property later seized as evidence, these agents, in flagrant violation of Rule 5, *Federal Rules of Criminal Procedure,* and in open disregard of the rules crystallized in *Miranda v. Arizona,* 384 U. S. 436, prevailed upon the Defendant to sign a consent to search other fixed premises located in another section of the City, which search also yielded property that was seized incident thereto either as evidence or contraband.

Defendant further says that the United States Attorney intends to use this evidence so unlawfully seized against this defendant on the trial of this cause, and as a basis for the forfeiture of the automobile seized at the time of his arrest, unless an order is entered herein quashing said arrest warrant and suppressing the evidence obtained by said unlawful searches and seizures.

WHEREFORE, defendant moves and prays (1) that an order be entered not only quashing the arrest warrant but suppressing as evidence all property seized incident thereto; as well as all fruit of this illegality. Next, (2) that all said evidence be excluded at the trial and hearing of this cause, and in any and all related causes. Further, (3) that all of the said property, so unlawfully seized herein, be either restored forthwith to the possession of the defendant, or otherwise disposed of according to law.

JAMES R. WILLIS,
Attorney for Defendant.

BRIEF IN SUPPORT OF MOTION.

It is, of course, the law that, under Rule 4, *Federal Rules Criminal Procedure,* an arrest warrant must set forth facts or information affording a sufficient basis for a finding of probable cause to believe that a crime against the U. S. has been committed (*Hollingsworth v. United States,* 321 F. 2d 342). And, it is likewise a requirement that the complaint, which forms the basis for the issuance of the warrant, must be constitutionally sufficient to enable the commissioner "to determine whether the 'probable cause' to support a warrant exist" (*Giordenello v. United States,* 357 U. S. at 486). Moreover, as was held by this Court, in an opinion by our Chief Judge,

> "The point, then is not merely whether probable cause existed for the issuance of this warrant, but whether [the agent] informed the commissioner of facts sufficient for the commissioner to determine whether probable cause existed." (*United States v. Raidl,* 250 F. Supp. 278 [N. D. Ohio, 1965].)

When these precedents are imposed on the complaint and warrant in this case, it is most clear that they are fatally defective.

First, in the complaint only conclusory allegation that Thomas had violated a precise federal statute is indicated. *Next,* the complaint, in other conclusory language, merely indicates that it is based on information furnished the complainant, "by Cleveland police narcotics detectives, reliable informants of the Federal Narcotics Bureau, and agents of the U. S. Bureau of Narcotics, Chicago, Illinois." So stated it is apparent that the naked allegation of reliability of these informants fail to satisfy the requisites of *Aguilar v. Texas,* 378 U. S. 109 (1964) and *Jones v. United States,* 362 U. S. 257 (1960)—that the magistrate must be informed of some of the underlying circumstances supporting the required conclusions.

Next, the conclusory allegations, set forth therein, fail to satisfy the determination made in *Giordenello,* that

to support the issuance of a warrant the complaint must contain in addition to a statement of the essential facts constituting the offense (Rule 3, *Federal Rules*), a statement of the facts relied on to establish probable cause.

Thus it is as clear here, as it was in *United States v. Brennan*, 251 F. Supp. 99 (N. E. Ohio, 1966), also decided in this Court, that

> "This cursory review of the above cited cases compels the conclusion that the commissioner acted without legal justification in authorizing the arrest. * * *" (*Id.*, at 105.)

If then the warrant was defective—that is, constitutionally infirm—then it follows "every subsequent step in the investigation is permeated with the taint of this illegality, and all evidence must be suppressed" (Ibid).

In this case, that means all the physical evidence seized incident to the actual arrest and all its fruits. Further, we contend that this same principle requires the restoration of the automobile, and either the return or the destruction of all other evidence not sufficiently attenuated to dissipate the taint.

Respectfully yours,

JAMES R. WILLIS,

Attorney for Defendants.

MOTION TO ADVANCE FOR AN IMMEDIATE TRIAL.

(Filed February 12, 1968.)

William Thomas, one of the defendants herein, by and through counsel, hereby moves this court, in writing to grant him a speedy trial herein, within the meaning of the Sixth Amendment of the Constitution.

In support thereof the Defendant avers that since his arraignment he has maintained his plea of not guilty and that, while he has not previously insisted that his cause be speedily determined, and further delay in the ultimate resolution of this case would deny him, to a prejudicial degree, due process.

WHEREFORE, the defendant respectfully moves this court that this cause should be scheduled for an immediate trial.

JAMES R. WILLIS,
Attorney for Defendant.

ORDER FOR DISMISSAL.

(Filed April 3, 1968.)

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure and by leave of court endorsed hereon the United States Attorney for the Northern District of Ohio hereby dismisses the indictment against William Thomas & Lenora Jackson, defendants.

MERLE M. MCCURDY,
United States Attorney,
By: JAMES L. OAKAR,
Asst. U. S. Attorney.

Leave of court is granted for the filing of the foregoing dismissal.

/s/ THOMAS D. LAMBROS,
United States District Judge.

MOTION TO VACATE ORDER OF DISMISSAL.

(Filed April 8, 1968.)

The Defendant hereby moves the Court to vacate the order of dismissal entered herein on April 3, 1968, notice of which the Defendant received on April 5, 1968. In support thereof the Defendant avers as follows:

1. That he was arrested herein on the basis of a warrant issued by this Court, which warrant substantially charged the crime that is the subject of the indictment in this case.

2. That indictment to the execution of this arrest warrant certain physical property was seized, which property was turned over to the state authorities and became the subject of a state prosecution—i.e., *State v. Thomas,* No. 84450, Cuyahoga County Common Pleas Court. In addition to the above referred to property, the Defendant's car was seized.

3. That based on the Defendant's possession of this property which was discovered and seized incident to the execution of the warrant in this case, the Defendant has been convicted in the state court and is awaiting sentence pending a determination, by this Court, as to validity of the warrant herein, and the resolution of the Government's case.

4. That at the state trial, in which the jury was waived, the decision as to the validity of the warrant was reserved for this Court to make, because the warrant that furnished the basis for the seizure was a federal warrant, and the issue as to its validity not only entailed a consideration of the warrant as written by this issue, to be properly determined involved a consideration of facts showing an illegal search and seizure in Illinois of contraband that had been sent through the mails.

5. That it was understood and stipulated, in the state court, that the state court's decision, on the merits of the state prosecution, would be subject

to the ultimate determination by a federal court as to the validity of the federal warrant issued in this case.

6. That if this case is to be, and can be dismissed, without a ruling on the Defendant's challenge that the warrant was defective, then to that extent the Defendant will be unnecessarily denied due process, for by the simple device denying him the right to show his arrest was illegal, the Government will succeed in effecting a conviction on a silver platter basis.

7. That the Government ought not be allowed to dismiss a case where its purpose is to perpetuate a state conviction based on an illegal federal warrant, and to shield against a valid motion seeking the return of an automobile seized on the basis of illegally acquired evidence.

THEREFORE, the Defendant moves the Court to vacate its order of dismissal and to schedule the motion to suppress and return illegally seized property pending on the date of the Court's dismissal order, for an immediate hearing.

JAMES R. WILLIS,
Attorney for Defendant.

ORDER OVERRULING MOTION TO DISMISS.

(Filed July 2, 1968.)

Upon consideration,

IT IS ORDERED that the motion of the defendant William Thomas to vacate the order of dismissal is hereby overruled.

/s/ THOMAS D. LAMBROS,
United States District Judge.

No. 18,929.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM THOMAS, *et al.*,

Defendant-Appellant.

ORDER DISMISSING APPEAL.

(Filed February 18, 1969.)

BEFORE EDWARDS, MCCREE, and COMBS, Circuit Judges.

A panel of this court having been duly appointed pursuant to Rule 3(e) of the Rules of the Sixth Circuit; and appellant's brief having been received and considered; and it appearing to the panel that the appeal from the dismissal of the indictment is frivolous and entirely without merit; upon consideration, it is ORDERED that the appeal be and it hereby is dismissed pursuant to Rule 9 of the Rules of the Sixth Circuit.

Entered by order of the court

CARL W. REUSS,

Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1193

WILLIAM THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 12a) dismissing the appeal is not reported.

JURISDICTION

The order of the court of appeals was entered on February 18, 1969. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to March 26, 1969, and on March 24, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner may challenge the government's pre-trial dismissal of the indictment against him, with

leave of court, while his motion for suppression and/or return of allegedly illegally seized property was pending.

STATUTE AND RULES INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 41, F.R. Crim. P., provides in pertinent part:

* * * * *

> **(e) Motion for Return of Property and To Suppress Evidence.**
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admis-

> sible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.
>
> * * * * *

Rule 48(a), F.R. Crim. P., provides:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

STATEMENT

On November 16, 1966, an indictment was returned in the United States District Court for the Northern District of Ohio, charging petitioner with illegally acquiring and then transferring marihuana, in violation of 26 U.S.C. 4744(a) and 4742(a) (Pet. App. 3a–4a). On February 12, 1968, petitioner moved under Rule 41(e), F.R. Crim. P., to suppress as evidence and to return property seized at the time of his arrest. He alleged that the sworn complaint underlying the arrest warrant did not adequately establish probable cause; that information leading to the arrest was itself the product of an illegal search of his automobile by state officers; and that execution of the arrest warrant had been illegally delayed in order to enable officers to search certain premises (Pet. App. 4a–6a). Petitioner also made a motion to dismiss for lack of a speedy trial.

Three days before the filing of his motion under Rule 41(e), petitioner had been convicted (on February 9, 1968) in a state court for possessing marihuana for the purpose of sale. This state indictment had been returned on May 12, 1966, some six months before the federal indictment; it, like the indictment in this case, alleged possession of marihuana on April 21, 1966. Thereafter, on April 3, 1968, with leave of court pursuant to Rule 48(a), F.R. Crim. P., the United States attorney dismissed the federal indictment (Pet. App. 9a).

Several days later, petitioner moved to vacate the dismissal, alleging that the property seized at the time of his arrest had been turned over to state authorities and had been the subject of the state prosecution (Pet. App. 10a). It was further alleged (*ibid.*):

> 3. That based on the Defendant's possession of this property which was discovered and seized incident to the execution of the warrant in this case, the Defendant has been convicted in the state court and is awaiting sentence pending a determination, by this Court, as to the validity of the warrant herein, and the resolution of the Government's case.
>
> 4. That at the state trial, in which the jury was waived, the decision as to the validity of the warrant was reserved for this Court to make, because the warrant that furnished the basis for the seizure was a federal warrant, and the issue as to its validity not only entailed a consideration of the warrant as written by this issue, to be properly determined involved a consideration of facts showing an illegal

search and seizure in Illinois of contraband that had been sent through the mails.

Petitioner contended that dismissal of the federal indictment would "perpetuate a state conviction based on an illegal federal warrant" (Pet. App. 11a). The district court denied the motion (Pet. App. 11a). The government responded to petitioner's appeal by moving to dismiss it on the ground that a *nolle prosequi* before trial under Rule 48(a) is not an appealable "final decision" under 28 U.S.C. 1291. The court of appeals dismissed the appeal as frivolous (Pet. App. 12a).

ARGUMENT

1. Petitioner has no basis for objecting to the government's dismissal of the federal charges against him. Rule 48(a), F.R. Crim. P., provides that the government may dismiss an indictment prior to trial by leave of court "and the prosecution shall thereupon terminate". The right of the government to enter a *nolle prosequi* at any time before impaneling the jury, without the consent of the defendant, was fully recognized at common law. *Confiscation Cases,* 7 Wall. 454, 457. The Rule modified this practice only insofar as it added the requirement that leave of court for such dismissal be given, a requirement intended to guard against harassment of a defendant by charging, dismissing, and re-charging without placing him in jeopardy. See Notes of Advisory Committee, 18 U.S.C.A. Rule 48; *Spriggs* v. *United States,* 225 F. 2d 865 (C.A. 9), certiorari denied, 350 U.S. 954; *United States* v. *Cox,* 342 F. 2d 167, 171 (C.A. 5), certiorari denied, 381 U.S. 935. As Rule 48 provides, it is only when the

government seeks dismissal "during the trial," after jeopardy has attached, that an indictment may not be dismissed without a defendant's consent. *United States* v. *Tateo,* 377 U.S. 463, 467; *United States* v. *Chase,* 372 F. 2d 453, 464 (C.A. 4), certiorari denied, 387 U.S. 907.

2. Petitioner's opposition to the dismissal of the indictment against him is, of course, not motivated by any desire to insist on federal prosecution but by a desire to preserve a belated suppression motion filed in this case. That motion, however, is not properly before this Court, for the only judicial order entered in this case was the order overruling his motion to vacate the *nolle prosequi;* no order of any type has been entered to dispose of the suppression motion (see Pet. App. 1a). Compare *DiBella* v. *United States,* 369 U.S. 121; *Carroll* v. *United States,* 354 U.S. 394 (holding that orders *granting* or *denying* motions to suppress may be appealable only when they constitute an "independent proceeding" that is "solely for return of property and is in no way tied to a criminal prosecution *in esse* * * *" (369 U.S. at 131–132)).

Moreover, the motion challenging the seizure was not filed until *after* petitioner was convicted in the state court, allegedly through the use of the evidence he claims was illegally seized. Whatever "stipulation" was made in the state court making that conviction

"subject to the ultimate determination by a federal court as to the validity of the federal warrant" (Pet. App. 10a–11a) can hardly be said to bind the United States Attorney to press a federal prosecution he believes should be discontinued. If petitioner's conviction in the Ohio court was premised on illegally seized evidence, and if he has not deliberately defaulted in raising that claim, he possesses adequate remedies, see *Mapp* v. *Ohio,* 367 U.S. 643; *Kaufman* v. *United States,* No. 53, O.T. 1968 (decided March 24, 1969), that in no way implicate the dismissal of the federal indictment against him.[1]

[1] Before this Court (Pet. 7), as in the district court (Pet. App. 6a, 11a), petitioner contends that federal agents seized his automobile and that the seizure was unlawful. Accepting *arguendo* the allegation in his motion for suppression and return that his car was "seized at the time of his arrest" (Pet. App. 6a), it is quite likely that it was forfeited to the United States long before the motion, filed twenty-two months after the arrest, was presented. Under the provisions of 49 U.S.C. 781–788 and 19 U.S.C. 1606–1609, a vehicle appraised at less than $2500 which has been used to carry contraband may be administratively forfeited to the United States if no one files a claim and bond within twenty days of the first publication of notice of seizure and intent to forfeit. See, also, 26 C.F.R. 153.4. But as we have noted above, there has been no hearing on petitioner's motion and no order denying it. The whereabouts of the auto allegedly seized from him and his right to recover it or its value thus are not properly at issue in this present attempt to secure review of the government's voluntary dismissal of the indictment.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 24 1969
JOHN F. DAVIS, CLERK

In The Supreme Court Of The United States

October Term, 1968

No. ~~1196~~

CARL ODELL ECHARD

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

ALLAN SHERRY
Attorney at Law
104 North Sycamore Street
Woodsfield, Ohio
Attorney for Petitioner

In The Supreme Court Of The United States

October Term, 1968

No. _____

CARL ODELL ECHARD
Petitioner

vs.

STATE OF OHIO
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petitioner, Carl Odell Echard prays that a writ of Certiorari issue to review the judgment of the Supreme Court of Ohio made and entered by said Court by Journal Entry filed on the 30th day of October, 1968, a copy of which is attached hereto as Appendix I.

OPINIONS OF THE COURT BELOW

No opinion was rendered by the trial court, other than the mere determination of guilt. The Ohio Court of Appeals upon consideration of an appeal, did render an opinion which was not published; the same is incorporated herein as Appendix III. The Supreme Court of Ohio did not render either an official or unofficial opinion but by Journal Entry overruled this Petitioner's Motion for leave to appeal.

The Appellate Court, in addition to the opinion, filed an opinion on reconsideration which was also unpublished and the same is incorporated herein as Appendix IV.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked under Title 28, USCA Section 1257 (3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * *, or where any title, right, privilege or immunity is specially set up is claimed under the constitution."

This cause also invokes a violation of the Sixth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

I

When the evidence of the State, in a criminal action, proves beyond a reasonable doubt that the defendant (petitioner) was not at the scene of a crime when the same was committed, is the subsequent conviction and imprisonment of this defendant not a denial of due process?

II

When a witness in a criminal case is under physical or legal compulsion to testify as to identification of the defendant, is not said testimony a violation of the defendant's right to a fair and impartial trial?

III

Where the defendant does not testify in a criminal action is it not error prejudicial to permit testimony charging the defendant with violating the law on another occasion.

IV

When a defendant in a criminal case is required to

be in a so-called "line-up" without the presence of counsel and the only man in said "line-up", is this not a violation of the defendant's rights under the Sixth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been previously ascertained by a law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

On February 10, 1966, at five o'clock a.m. two men entered the Country Kitchen (a restaurant) and according to the testimony of one of the employees one of the men used a screw driver and the other used a knife. Two waitresses were threatened; only one, Mrs. Thelma Ewers was called as a witness by the State. According

to the testimony of other State witnesses, at the same time this restaurant was being robbed, the defendant (petitioner) was being chased for another occurrence some twenty miles from the scene and was in custody the same day at that same time. The sole testimony of Mrs. Ewers placed the defendant (petitioner) at the scene of the crime. Mrs. Ewers did not know this defendant (petitioner) and had, according to her testimony, only seen him the day of the robbery. While the defendant (petitioner) was confined in another State and without Mrs. Ewers going to that State or seeing the defendant (petitioner) or any photographs, signed a sworn affidavit implicating this defendant in this crime.

Upon this evidence, the defendant (petitioner) was convicted and sentenced to ten to twenty-five years in the Ohio State Penitentiary. It is from this judgment and sentencing that this appeal is taken.

STATE OF THE PROCEEDINGS AT WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

During the trial of this action a Motion for Mistrial was made after the introduction of testimony by the sheriff regarding previous violations of the law by the defendant (petitioner) which Motion was overruled. This matter was raised again in the Appellate Court and the Supreme Court of Ohio.

Objection was made during the trial and raised again in the Appellate Court and Supreme Court of Ohio regarding the compulsion of a witness to testify.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The questions which have been raised in all of the lower courts and which are being raised here are substantially as follows:

1. The State's evidence was in conflict. When the crime was allegedly committed the defendant (petitioner) was in custody some twenty or more miles away,

2. The eye witness who testified identifying this defendant had previously identified him by affidavit without ever having seen the defendant.

3. The defendant (petitioner) was subjected to a "line-up" without counsel, without being advised of his rights to counsel and was the only person in the "line-up".

4. It is error when a police officer during trial, in front of a jury, volunteers information accusing this defendant (petitioner) of another crime which was not an issue in this case.

IA

WHEN THIS PETITIONER'S INNOCENCE WAS ESTABLISHED BY THE STATE'S EVIDENCE HE SHOULD HAVE BEEN ACQUITTED AS A MATTER OF LAW.

The sole eye witness placed the defendant (petitioner) at the scene of the crime which occurred at 5:00 o'clock a.m. on the date in question (R56). She further testified that the crime occurred between 5:00 and 5:30 o'clock a.m. (R67). She further testified as follows:

Thelma Ewers (Cross Examination)

Q. — Are you sure, Mrs. Ewers, this wasn't four o'clock instead of five o'clock?

A. — It was five o'clock.

Q. — You're absolutely positive?

A. — Absolutely. I'm absolutely positive. (R72)

State Patrolman Jurrin (Direct Examination)

Q. — Did you go to St. Marys?

A. — Yes, sir, I did.

Q. — What time was this?

A. — Around five a.m. (R47).

State Patrolman Jurrin (Cross Examination)

Q. — Before five-fifteen when you crossed the bridge?

A. — It was right around five. Few minutes either way. * * *

Q. — Then these men were in West Virginia within five or ten minutes after five a.m. that morning?

A. — Yes, sir. (R53).

IB

THE SO-CALLED EYE WITNESS WAS UNDER COMPULSION TO TESTIFY.

Thelma Ewers (Cross Examination)

Q. — I'll rephrase it. Prior to May 11th, 1966, did you sign an affidavit concerning Carl Odell Echard and the robbery at the Country Kitchen, and at that time you had not seen him to identify him?

A. — Yes, I had not saw him.

Q. — So on February 16, 1966, an affidavit that you signed to have Carl Odell Echard—this man—returned from West Virginia as one of the persons who robbed the Country Kitchen—you hadn't seen him to identify him by name, had you?

A. — No, I hadn't. (R65)

IC

IT IS ERROR PREJUDICIAL TO THE DEFENDANT IN A CRIMINAL CASE, TO HAVE TESTIMONY THAT THE DEFENDANT HAS BROKEN THE LAW ON ANOTHER OCCASION.

The complaining witness, the Sheriff of Monroe County, was asked, "* * * now, did you notify any arresting authorities, Sheriff, of the description of the car?

A. — At approximately three o'clock that same morning a car pulled out of Newport that had got gas and didn't pay for it, and this was identified as the same car with these individuals. That's the reason the police and the Sheriff's Department were alerted.

CONCLUSION

The petitioner obviously could not have been in two places at the same time. Two state patrolmen specifically testified that they chased a car in Washington County across the St. Marys bridge into West Virginia at five o'clock a.m. (a few minutes before or after) and that the men were in West Virginia at ten after five the same day this crime was committed. Mrs. Ewers also

testified positively that the defendant (petitioner) entered this restaurant a few minutes after five a.m. in the company of another man, ordered food that while the same was being prepared, robbed the restaurant, and left in a car heading the opposite direction from where the state patrolmen chased this defendant (petitioner). The record also shows that the reason the state patrol pursued this car was not on the basis of this robbery but that a car of like description had purchased gasoline at a service station in Washington County and had left without paying for the same. In addition to this highly questionable testimony of Mrs. Ewers, we again emphasize that even though Mrs. Ewers did not know this defendant (petitioner) and had no basis to form an opinion, did by affidavit, identify him on February 16, 1966. We submit that the Trial Court did not direct a verdict of acquittal and this should have been done on the basis of the evidence.

It can be readily seen that without the eye witness testimony of Thelma Ewers, the petitioner certainly could not have been convicted. It is further apparent that a conviction as serious as this, based upon the highly questionable testimony of Mrs. Ewers is improper and a denial of due process and that this Court should admit this case for review.

It is, therefore, respectfully requested that a Writ of Certiorari be issued under the seal of this Court to the Supreme Court of Ohio to the end that the judgment of the Supreme Court of Ohio may be reviewed and reversed.

ALLAN SHERRY
Attorney for petitioner

APPENDIX I

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO AFFIRMING JUDGMENT OF THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals of Monroe County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein. Filed: October 30, 1968

APPENDIX I

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL

It is ordered by the Court that this motion be overruled.

APPENDIX II

JOURNAL ENTRY, COURT OF APPEALS OF OHIO, SEVENTH DISTRICT, COUNTY OF MONROE

This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed and it is ordered that appellee recover of appellant its costs herein.

The Court finds that there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

Motion for reconsideration overruled.

Filed: October 14, 1967

APPENDIX III

OPINION OF THE COURT OF APPEALS OF OHIO

O'NEILL, J.

On February 10, 1966, some time between the hours of 4:00 a.m. and 5:00 a.m., two men entered a restaurant and robbed the employees of said restaurant of approximately $80.00. The defendant was later identified by one of the restaurant employees as being one of the persons engaged in the robbery. Defendant was brought to trial, found guilty, and sentenced to a term of ten to twenty-five years in the Ohio Penitentiary.

Appellant, for his First Assignment of Error, complains that the defendant was prejudiced because of testimony of a witness, which testimony appellant contends alleged that the defendant had broken the law on

another occasion. Reference is had to testimony at Pages 19 and 20 of the bill of exceptions wherein a witness testified that:—

> "At approximately three o'clock that same morning a car pulled out of Newport that had got gas and didn't pay for it, and this was identified as the same car with these individuals. * * *."

The very language of this testimony indicates that it was an identification of an inanimate object, to-wit: the car, rather than any individuals, and that it was not in any way any attempt to implicate the defendant in some other crime in such a manner that it would have prejudiced the defendant before the jury.

For his Assignment of error No. 2, the appellant insists that the verdict was contrary to law and was not sustained by evidence. He attaches as his reasoning the testimony of one of the victims of the subject robbery. This witness specifically identified the defendant as being one of the persons involved in the robbery. She was, however, somewhat indefinite at times and at other times very deliberate as to the time of day that the robbery took place. There was other evidence in the trial which indicated that the defendant was in another state at the time that the witness claimed he had perpetrated the robbery.

In the absence of any prejudicial error, the weight of the testimony of the witness is for determination by the jury, and the verdict in the instant case would indicate that the jury in the over-all accepted the credibility of the witness.

In his assignment of error number 3, the appellant contends that the State failed to prove that the alleged crime took place in Monroe County, Ohio. During the testimony, a witness was asked to identify and locate the place where the robbery took place. The witness identified the place as being "The Country Kitchen", and identified the Country Kitchen as being "right above Fly". There is other testimony contained in the bill of exceptions which mentions that the defendant travelled in his car on State Route #7. It has been held

by the Supreme Court that it is not essential that the venue of a crime be proven in express terms provided it is established by all of the facts and all of the circumstances in the case beyond a reasonable doubt that the crime was committed in the county and state as alleged in the indictment.

If all of the testimony of the various witnesses contained in the bill of exceptions were put together and considered with their various references to different locations, one could come to only one conclusion, that conclusion being that the loci of the crime was within Monroe County of the State of Ohio.

Approved
JOSEPH E. O'NEILL
Judge

Dated: September 12, 1967

APPENDIX IV

OPINION ON RECONSIDERATION OF THE COURT OF APPEALS OF OHIO

LYNCH, J.

United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 35 LW 4597, and Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 35 LW 4614, deal with identification of defendant in a police "line-up" without counsel for defendant already appointed being present, because this procedure did not give counsel for defendant adequate preparation for effective cross-examination of such witnesses.

In the instant case there was no police "line-up" as such. In the cross-examination of the sheriff he testified that one of the witnesses to the robbery, Shirley Ritchie, was brought into the room where the defendant was seated and was asked if this was the man (R. 11). However, Shirley Ritchie did not testify in this case. Defendant was not asked to do anything, and defendant was fully aware of the identification procedure.

The applicable case is Stovall v. Denno, 388 U. S. 293; 18 L.Ed. (2d) 1199, 35 LW 4610, which held that

the Wade and Gilbert rules should not be made retroactive, and that a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.

Under the circumstances of this case, we hold that defendant's constitutional rights were not violated.

JONES, P. J. Concurs

O'NEILL, J. Concurs

Dated: October 5, 1967

Approved:
JOHN J. LYNCH
Judge